

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: 755/10

In the matter between

ABSA BANK LIMITED

Plaintiff

and

LYNPETE TRADING 3 (PTY) LTD

First Defendant

WESLEY ROBERT SHUTTES

Second Defendant

JUDGMENT DELIVERED ON 17 MARCH 2010

ZONDI, J

Introduction

[1] This is an application for summary judgment in terms of Rule 32 of the Uniform Rules of Court.

[2] The plaintiff instituted an action in this Court in which it claimed from the defendants jointly and severally payment of the sum of R1 534 187-99; interest on the said sum at the rate of 8.35% per annum, calculated on daily balances and capitalised monthly from 02 December 2009 to date of payment, both dates

inclusive; an order declaring the immovable property mortgaged by mortgage bond, executable and costs on an attorney and client scale.

[3] The plaintiff's cause of action is based on a loan agreement, deed of suretyship and mortgage bond.

[4] In support of the application for summary judgment plaintiff filed an affidavit deposed to by one Petrus Jacobus Bosman who states:

- "1. I am a manager of Absa Bank Limited ... and duly authorised to make this affidavit.*
- 2. I have the documents in this matter under my control and access to all relevant data.*
- 3. From personal knowledge I swear positively to the facts set out in plaintiff's summons and particulars of claim.*
- 4. I verify with regard to plaintiff's summons and particulars of claim the cause of action and prayers against defendants..."*

He repeats the prayers as set out in the summons. Finally, he avers that in his opinion the defendants have no *bona fide* defence to the plaintiff's action and that a notice of intention to defend has been delivered solely for the purpose of delay.

[5] In the summary judgment application the plaintiff does not seek the relief against the defendants jointly and severally.

[6] The defendants oppose the application and have filed an opposing affidavit deposed to by Wesley Robert Shuttes in which he sets out the facts upon which he contends for the dismissal of the summary judgment application. He states that:

- 6.1 the written mortgage loan agreement upon which the plaintiff is suing was not attached to its particulars of claim;
 - 6.2 a certain page containing material terms of the mortgage bond upon which the plaintiff relies in its particulars of claim was not included in the mortgage bond;
 - 6.3 the suretyship which seeks to establish the second defendant's liability is invalid.
 - 6.4 the contents of the plaintiff's verifying affidavit are not within the personal knowledge of Petrus Jacobus Bosman and that therefore he cannot swear positively to the facts verifying the cause of action and the amount claimed in the summons.
 - 6.5 that there has been non joinder; and
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6.6 finally, that the relief sought in the summary judgment differs to the relief sought in the summons

[7] The defendants accordingly contend that the provisions of Rule 32(2) have not been complied with and the application for summary judgment should therefore be dismissed with costs.

Discussion

[8] Rule 32(2) provides that the plaintiff shall accompany an application which he makes for summary judgment by an affidavit made by such plaintiff or by other person who can swear positively to the facts, verifying the cause of action and the amount, if any, claimed, and stating that in his opinion there is no *bona fide* defence to the action and that a notice of intention to defend has been delivered solely for the purpose of delay.

[9] It is trite that the purpose of the procedure for summary judgment is to prevent a defendant who has no defence to a claim from delaying the matter unnecessarily by abusing the Court's process and to enable it to grant a final judgment without a trial despite the fact that a defendant has entered an appearance to defend (**Maharaj v Barclays National Bank Ltd** 1976(1) SA 418 (A) and **Stocks and Stocks Properties (Pty) Ltd v City of Cape Town** 2003(5) SA 140 (C) at 145 D – E).

[10] With this background I now turn to consider the defences raised by the defendants. The first point taken by the defendants was that the plaintiff's failure to annex to the summons a loan agreement, upon which the plaintiff is suing, renders its summons excipiable. *Mr Wilkens*, who appeared for the defendant, submitted that an excipiable summons cannot form a basis for summary judgment. In making that submission he pointed out that the loan agreement is a vital document in this matter as the rights and obligations of the parties flow from it.

[11] In reply, *Mr Engela*, who appeared for the plaintiff, submitted that the plaintiff's failure to annex the mortgage loan agreement to the summons was not fatal to its case in light of the fact that it is fully pleaded in the particulars of claim and the defendants have not denied what is pleaded. He pointed out that the plaintiff's reason for not annexing the loan agreement is due to the fact that it cannot be located.

[12] It is correct that if a party in his pleading relies upon a written contract a true copy of the contract or the part relied upon must be annexed to the pleading. But if a written contract is not annexed it is essential that its terms should be particularised. This is so because the defendant is entitled to know what case he has to meet.

[13] The case that is pleaded by the plaintiff in its particulars is that during or about 2007 and at Cape Town the parties through their duly authorised

representatives concluded a written mortgage loan agreement in terms whereof the plaintiff lent and advanced to the first defendant a capital amount of R3 000 000-00.

[14] To secure payment of the loan a mortgage bond was registered over a certain immovable property and the second defendant signed a deed of suretyship in terms of which he bound himself as surety and co-principal debtor jointly and severally together with the first defendant (the principal debtor) in favour of the plaintiff for the payment of the amount which may be owed by the first defendant to the plaintiff.

[15] The second defendant's response to the averments as contained in the plaintiff's particulars of claim is that the property over which the mortgage bond was passed was purchased as a residential property/holiday home and not in the ordinary cause of the second defendant's business.

[16] In my view the plaintiff should have fully set out the terms of the loan agreement in its particulars of claim in view of the fact that a copy of the loan agreement, upon which it relies, is not attached to its summons. It is not clear from the particulars of claim whether the loan agreement gave the plaintiff the right to claim repayment of all the amounts owing to it and to have the bonded property declared executable should the defendants breach any condition in the loan agreement.

[17] Summary judgement is an extra-ordinary and stringent remedy and that it is necessary that the defendant, against whom it is sought, should be allowed to see a copy of a document which forms a vitally important part of the case which is being made against him.

[18] It is correct that in its particulars of claim the plaintiff bases its cause of action not only on the loan agreement but also on the mortgage bond and the deed of suretyship. But it is the loan agreement which gives meaning to the mortgage bond and the deed of suretyship. It is the loan agreement which provided for the payment of the loan in monthly instalments. The mortgage bond and the suretyship draw their essence from the loan agreement.

[19] It is an accepted principle that the Court can only grant summary judgment if on the papers before it, it has no reasonable doubt that the plaintiff's claim is unanswerable and that the defendant has not got a defence which may possibly succeed. (**Wise & Co (Africa) Ltd v Gin** 1946 CPD 524).

[20] In the absence of a loan agreement and the failure by the plaintiff to fully plead its terms I am not satisfied from the papers before me, that the plaintiff is entitled to the summary judgment.

[21] In light of the conclusion I have reached it is unnecessary for me to consider other defences raised by the second defendant.

The Order

[22] In the result summary judgment application is refused and the defendants are granted leave to defend. Costs are reserved for later determination.

A handwritten signature in black ink, appearing to be 'Zondi D H', is written over a horizontal line.

ZONDI D H